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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1255

JAMES E. DOUGLAS, JR.,
APPELLANT,

v.

SEACOAST PRODUCTS, INC.,
THE NEW SMITH MEAL COMPANY, INC.,
and SECOND OCEANIC CORPORATION,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF OF THE AMICUS CURIAE, THE COMMONWEALTH OF MASSACHUSETTS, IN SUPPORT OF NOTING PROBABLE JURISDICTION

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Interest of the Commonwealth of Massachusetts

The Commonwealth of Massachusetts currently has in force several statutes which, like the Virginia statutes here

at issue, impose restrictions upon nonresidents and resident aliens relative to fishing in the State's territorial waters.[1] A decision in this case would have a substantial *stare decisis* effect on possible future cases challenging such statutes.[2]

Accordingly, in addition to the arguments advanced by the defendant-appellant and various *amici curiae* in support of noting probable jurisdiction, Massachusetts sets forth the following points.

Argument

I. THE ENACTMENT OF 16 U.S.C. § 1081 (1974) HAS NOT PREEMPTED THE POWER OF VIRGINIA TO IMPOSE THE RESIDENCY AND CITIZENSHIP REQUIREMENTS CONTAINED IN VA. CODE §§28.1-60 AND 28.1-81.1 (1950).

An exercise of federal power preempts an exercise of state power only when the former is necessarily inconsistent with the latter. *See, e.g., Skiriotes* v. *Florida*, 313 U.S. 69, 75 (1941). No such inconsistency exists between the provisions of 16 U.S.C. § 1081 (1974) and the residency and citizenship requirements contained in VA. CODE §§28.1-60 and 28.1-81.1 (1950).

The provisions of 16 U.S.C. § 1081 (1974) address only the rights of foreign vessels. They are completely silent relative to the rights of domestic vessels. With respect to

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[1] Specifically, such statutes are MASS. GEN. LAWS ANN. ch. 130, §§38 and 55 (1974); Ch. 35, MASS. ACTS [1923] 17 *as amended by* Ch. 219, [1962] MASS. ACTS 107; and Ch. 158, [1936] MASS. ACTS 153.

[2] It should be noted that on March 12, 1976, the Supreme Judicial Court of Massachusetts rendered a decision to the effect that the restrictions imposed on nonresidents by Ch. 35 MASS. ACTS [1923] 17 *as amended by* Ch. 219, [1962] MASS. ACTS 107, are violative of the Privileges and Immunities Clause of U.S. CONST. art. IV, §2(1). *Commonwealth* v. *Westcott*, MASS. ADV. SH. (1976) 696. The Attorney General of Massachusetts is currently preparing for this Court a Petition for a Writ of Certiorari relative to such decision.

foreign vessels, the statute generally excludes said vessels from fishing in United States waters. To the extent that said vessels are permitted to fish in United States waters, the permission is contingent upon the "concurrence" of the States "directly affected." Under such circumstances, 16 U.S.C. § 1081 (1974) can hardly be said to conflict with, and thereby preempt, the operation of Virginia's residency and citizenship requirements.

There is a second reason why 16 U.S.C. §1081 (1974) should not be construed as preempting Virginia's residency and citizenship requirements. The right to determine who may or may not take fish is a right derived from ownership. *See McCready* v. *Virginia*, 94 U.S. 391, 395-396 (1877). *See also, Geer* v. *Connecticut*, 161 U.S. 519, 523-534 (1896). In that regard, Congress has, through the passage of the Submerged Lands Act of 1953, 43 U.S.C. § 1301 *et seq.* (1970), expressly established that the ownership of fish found within three miles of each State's coastline lies exclusively in that State. It has thereby also established that each State possesses the exclusive power, subject to relevant constitutional requirements, to determine who may and who may not take such fish.[3] Thus, to construe 16 U.S.C. § 1081 (1974) as superseding an exercise of that power would effect an implied repeal of the Submerged Lands Act. Because of this Court's traditional hostility to the doctrine of implied repeal, that construction should be rejected. *See Morton* v. *Mancari*, 417 U.S. 535, 550-551 (1974).

Accordingly, it is plain that 16 U.S.C. § 1081 (1974) has not preempted Virginia's attempt, through VA. CODE §§28.1-60 and 28.1-81.1 (1950), to restrict the right of nonresidents and resident noncitizens to fish in its waters.

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[3] Although Congress expressly retained the power to regulate commerce, navigation, national defense and international affairs within State territorial waters, said power does not, by itself, include the right to determine who may and who may not take fish. *See The Abby Dodge*, 223 U.S. 166, 174 (1912); *McCready, supra.*

II. Neither the Residency Requirement of Va. Code §28.1-60 (1950) Nor the Citizenship Requirement of Va. Code §28.1-81.1 (1950) Violates the Equal Protection Clause.

Distinctions drawn by a State in the course of economic regulation comport with the requirements of the Equal Protection Clause so long as they are rationally related to a legitimate State purpose. *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106, 110 (1949). Both the distinction drawn by Va. Code §28.1-60 (1950), between residents and non-residents, and that drawn by Va. Code §28.1-81.1 (1950), between citizens and non-citizens, meet the standard of constitutionality.

By virtue of the Submerged Lands Act of 1953, 43 U.S.C. §1301 *et seq.* (1970), the citizens of each State, in their collective sovereignty, possess exclusive ownership rights in all of the fish found within the territorial waters of that state.[4] Non-residents and aliens, not being citizens of the State, possess no such ownership rights. Thus, in withholding the right to take fish from those who are non-residents or resident non-citizens, Va. Code §§28.1-60 and 28.1-81.1 (1950) further the purpose of preserving an important natural resource for the exclusive use of those who own the resource. The furtherance of such a purpose on the part of the State is clearly within its police power.[5]

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[4] Prior to passage of the Act, this Court had held that the States possessed no common law rights of ownership in fish found in the marginal sea. *Toomer* v. *Witsell*, 334 U.S. 385, 395-402 (1948).

[5] While language in *Takahashi* v. *Fish and Game Comm'n*, 334 U.S. 410 (1948) may suggest that a distinction drawn between citizens and resident non-citizens relative to the right to take fish is violative of the Equal Protection Clause, the distinction actually presented in that case was one between non-citizens of a particular nationality and all other non-citizens. Thus, the Court's discussion of the broader distinction was unnecessary. For that reason, and in light of the precedent in favor of a contrary view, *Takahashi* should not be deemed controlling in this case.

Geer, supra at 534-535. *See also Commonwealth* v. *Westcott*, Mass. Adv. Sh. (1976) 696, 715 (Reardon, J., dissenting).

Accordingly, neither the residency requirement of Va. Code §28.1-60 (1950) nor the citizenship requirement of Va. Code §28.1-81.1 (1950) is violative of the Equal Protection Clause.

Conclusion

The Commonwealth of Massachusetts urges that the Court note probable jurisdiction and set the case down for oral argument.*

Respectfully submitted,

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* The assistance of Eugene K. Chow of the Boston College Law School is gratefully acknowledged.

APPENDIX

In addition to the constitutional and statutory provisions set forth in the briefs of the defendant-appellant and of other *amici curiae,* relevant provisions of the Submerged Lands Act of 1953, as embodied in 42 U.S.C. § 1031 *et seq.* (1970), are herein set forth.

43 U.S.C. § 1301 (1970)

Definitions

When used in this chapter —

(a) The term "lands beneath navigable waters" means —

(1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;

(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, and

(3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined;

(b) The term "boundaries" includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the

time such State became a member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to Section 1312 of this title but in no event shall the term "boundaries" or the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico;

(c) The term "coast line" means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters;

(d) The terms "grantees" and "lessees" include (without limiting the generality thereof) all political subdivisions, municipalities, public and private corporations, and other persons holding grants or leases from a State, or from its predecessor sovereign if legally validated, to lands beneath navigable waters if such grants or leases were issued in accordance with the constitution, statutes, and decisions of the courts of the State in which such lands are situated, or of its predecessor sovereign: *Provided, however,* That nothing herein shall be construed as conferring upon said grantees or lessees any greater rights or interests other than are described herein and in their respective grants from the State, or its predecessor sovereign;

(e) The term "natural resources" includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life but does not include water power, or the use of water for the production of power;

(f) The term "lands beneath navigable waters" does not include the beds of streams in lands now or heretofore constituting a part of the public lands of the United

States if such streams were not meandered in connection with the public survey of such lands under the laws of the United States and if the title to the beds of such streams was lawfully patented or conveyed by the United States or any State to any person;

(g) The term "State" means any State of the Union;

(h) The term "person" includes, in addition to a natural person, an association, a State, a political subdivision of a State, or a private, public, or municipal corporation.

43 U.S.C. § 1311 (1970)

Rights of the States — Confirmation and establishment of title and ownership of lands and resources; management, administration, leasing, development, and use

(a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

Release and relinquishment of title and claims of the United States; payment to States of moneys paid under leases

(b) (1) The United States releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources; (2) the United States releases and relinquishes all claims of the United States, if any it has, for money or damages arising out of any operations of said States or persons pursuant to State authority upon or within said lands and navigable waters; and (3) the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States shall pay to the respective States or their grantees issuing leases covering such lands or natural resources all moneys paid hereunder to the Secretary of the Interior or to the Secretary of the Navy or to the Treasurer of the United States and subject to the control of any of them or to the control of the United States on May 22, 1953, except that portion of such moneys which (1) is required to be returned to a lessee; or (2) is deductible as provided by stipulation or agreement between the United States and any of said States;

Leases in effect on June 5, 1950

(c) The rights, powers, and titles hereby recognized, confirmed, established, and vested in and assigned to the respective States and their grantees are subject to each lease executed by a State, or its grantee, which was in force and effect on June 5, 1950, in accordance with its terms and provisions and the laws of the State issuing, or whose grantee issued, such lease, and such rights, powers, and titles are further subject to the rights herein now granted to any person holding any such lease to continue to maintain the lease, and to conduct operations thereunder, in accordance with its provisions, for the full term thereof, and any extensions, renewals, or replacements authorized therein, or heretofore authorized by the laws of the State issuing, or whose grantee issued such lease: *Provided, however,* That, if oil or gas was not being pro-

duced from such lease on and before December 11, 1950, or if the primary term of such lease has expired since December 11, 1950, then for a term from May 22, 1953 equal to the term remaining unexpired on December 11, 1950, under the provisions of such lease or any extensions, renewals, or replacements authorized therein, or heretofore authorized by the laws of the State issuing, or whose grantee issued, such lease: *Provided, however,* That within ninety days from May 22, 1953 (i) the lessee shall pay to the State or its grantee issuing such lease all rents, royalties, and other sums payable between June 5, 1950, and May 22, 1953, under such lease and the laws of the State issuing or whose grantee issued such lease, except such rents, royalties, and other sums as have been paid to the State, its grantee, the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States and not refunded to the lessee; and (ii) the lessee shall file with the Secretary of the Interior or the Secretary of the Navy and with the State issuing or whose grantee issued such lease, instruments consenting to the payment by the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States to the State or its grantee issuing the lease, of all rents, royalties, and other payments under the control of the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States or the United States which have been paid, under the lease, except such rentals, royalties, and other payments as have also been paid by the lessee to the State or its grantee;

Authority and rights of the United States respecting navigation, flood control and production of power

(d) Nothing in this chapter shall affect the use, development, improvement, or control by or under the constitutional authority of the United States of said lands and

waters for the purposes of navigation or flood control or the production of power, or be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power;

Ground and surface waters west of the 98th meridian

(e) Nothing in this chapter shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian, relating to the ownership and control of ground and surface waters; and the control, appropriation, use, and distribution of such waters shall continue to be in accordance with the laws of such States.

43 U.S.C. § 1312 (1970)

Seaward boundaries of States

The seaward boundary of each original coastal State is approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as

questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress.

43 U.S.C. § 1314 (1970)

Rights and powers retained by the United States; purchase of natural resources; condemnation of lands

(a) The United States retains all its navigational servitude and rights in the powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, propriety rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 1311 of this title.

(b) In time of war or when necessary for national defense, and the Congress or the President shall so prescribe, the United States shall have the right of first refusal to purchase at the prevailing market price, all or any portion of the said natural resources, or to acquire and use any portion of said lands by proceeding in accordance with due process of law and paying just compensation therefor.